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15 and AMERICAN HONDA MOTOR CO., INC.

16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA**

18 SACHIKO MUROMURA,

19 Plaintiff,

20 v.

21 RUBIN POSTAER AND ASSOCIATES,
22 a California corporation, AMERICAN
23 HONDA MOTOR CO., INC., a Delaware
24 Corporation,

Defendants.

Case No. CV 12-9263-DDP (AGRx)

**NOTICE OF MOTION AND
MOTION OF DEFENDANTS TO
DISMISS FOR FAILURE TO
STATE A CLAIM UNDER RULE
12(B)(6); MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: September 16, 2013
Time: 10:00 a.m.
Place: Courtroom 3 (Los Angeles)
Before: Hon. Dean D. Pregerson

[Proposed Order Filed Herewith]

1 TO PLAINTIFFS AND THEIR ATTORNEY OF RECORD:

2 PLEASE TAKE NOTICE that, on September 16, 2013 at 10:00 a.m., or as soon
3 thereafter as counsel may be heard in Courtroom 3 of the above-entitled court, located
4 at 312 N. Spring Street, Los Angeles, California, Defendants Rubin Postaer and
5 Associates and American Honda Motor Co., Inc. will and hereby do move this Court,
6 pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure,¹ to dismiss with
7 prejudice Plaintiffs' First Amended Complaint for failure to state a claim upon which
8 relief can be granted.

9 This Motion is brought on the grounds that Plaintiffs' First Amended Complaint
10 fails to state a claim against Defendants upon which relief can be granted pursuant to
11 Rule 12(b)(6).

12 This Motion is based on this Notice of Motion, the Memorandum of Points and
13 Authorities, Plaintiffs' First Amended Complaint, Rule 12(b)(6), all of the pleadings
14 and papers filed herein, and on such additional evidence and argument as the Court
15 may elect to consider at the hearing on this Motion.

16 This Motion is made following the conference of counsel pursuant to Local
17 Rule 7-3, which took place on August 2, 2013.

18
19 Dated: August 9, 2013

WINSTON & STRAWN LLP

20
21 By: /s/ Stephen R. Smerek

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INC.

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28 ¹ All further statutory references are to the Federal Rules of Civil Procedure unless
otherwise noted.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Plaintiffs' First Amended Complaint for copyright infringement against
4 Defendants fails as a matter of law. Although Plaintiffs were given ample opportunity
5 and direction as to what was required to sufficiently plead a claim of copyright
6 infringement, in their second attempt to state a cause of action, Plaintiffs demonstrate
7 that they do not have a viable claim as they continue to claim protection over non-
8 copyrightable subject matter—namely the natural properties of ferrofluid. As such
9 Plaintiffs again fail to state a plausible copyright claim. Plaintiffs' lawsuit must be
10 dismissed with prejudice because granting the type of protection Plaintiffs request
11 inappropriately extends the reach of copyright law and would violate the fundamental
12 principles of copyright law.

13 Copyright law only affords protection for original, expressive elements and the
14 selection and arrangement of unprotected elements in a work. Because the range of
15 expression with the use of ferrofluid is limited by how ferrofluid naturally reacts in
16 response to magnets, the copyright protection over the protected elements of
17 Plaintiffs' work is exceedingly thin. Once the unprotected elements of Plaintiffs' work
18 are filtered out, it is apparent that Plaintiffs' claims of copyright infringement cannot
19 withstand a motion to dismiss because Plaintiffs do not identify *any protected*
20 *elements* of their work that are substantially similar—let alone virtually identical—to
21 Defendants' advertisements. Thus, given Plaintiffs repeated failure to allege any facts
22 showing that Defendants copied protected elements of their Artwork, it is clear that
23 what Plaintiffs really seek in this lawsuit is to block the use of ferrofluid as an artistic
24 medium. However, copyright law does not protect ideas, and it cannot be used so
25 broadly as to preclude all artistic expression in a particular medium.

26 Therefore, Plaintiffs' First Amended Complaint against Defendants must be
27 dismissed with prejudice for failure to state a claim under Rule 12(b)(6).

1 **II. FACTUAL BACKGROUND**

2 Plaintiffs Sachiko Muromura and Minako Takeno (collectively “Plaintiffs”)
 3 allege that Defendants Rubin Postaer and Associates (“RPA”) and American Honda
 4 Motor Co., Inc. (“Honda”) (RPA and Honda together, “Defendants”) infringed upon
 5 their artwork “Protrude, Flow 2001” (“Artwork”). (*See generally*, First Amended
 6 Complaint (“FAC” or the “Amended Complaint”)).

7 As alleged in the Amended Complaint, Plaintiffs are artists who, among other
 8 things, through the use of ferrofluid and magnets, have created images that are
 9 projected onto a screen by means of a video camera. (FAC ¶¶ 8-9.) RPA is an
 10 advertising agency that created advertisements on behalf of its client, the Acura
 11 Division of Honda. (FAC ¶¶ 3, 12.)

12 In October 2010, Plaintiff Muromura contacted Defendants and asked whether
 13 her Artwork was featured in advertising for Acura. (FAC ¶ 15.) Defendants told
 14 Plaintiff Muromura that her Artwork was not used, explaining that “ferrofluid as an
 15 artistic medium is rapidly increasing.” (FAC ¶ 17.)

16 Despite such reassurances from Defendants, Plaintiffs filed this lawsuit,
 17 alleging Defendants’ advertisements constituted “copies” of their Artwork. Plaintiffs
 18 identify four advertisements made by Defendants that allegedly infringe on Plaintiffs’
 19 copyright: (1) an Acura Still Photo Campaign; (2) an Advanced Engineering Insights
 20 Video; (3) an Oil Shell Video; and (4) an Acura Oil Commercial. (*See generally*
 21 FAC.) Plaintiffs allege that Defendants infringed upon certain elements of their
 22 Artwork—specifically, ferrofluid creating a “pattern of spikes” in response to a
 23 magnet, (FAC ¶¶ 30-37, 58-60), the “reflective property of ferrofluid,” (FAC ¶¶ 37,
 24 41, 58-59), ferrofluid rising into a column in response to an overhead magnet, (FAC
 25 ¶¶ 42, 58-60), and a “pool of ferrofluid” when a magnet is not present. (FAC ¶¶ 37-38,
 26 43, 45, 58-59.) However, these elements of Plaintiffs’ Artwork are not elements of
 27 original expression, rather they are the result of the natural properties of ferrofluid and
 28 thus not subject to copyright protection.

1 **III. LEGAL DISCUSSION**

2 **A. Legal Standard**

3 **1. Rule 12(b)(6) and Rule 8**

4 Rule 8(a)(2) requires a civil complaint to contain a “short and plain statement of
 5 the claim showing that the pleader is entitled to relief” in order to “give the defendant
 6 fair notice of what the . . . claim is and the grounds upon which it rests.” Fed. R. Civ.
 7 P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). This standard
 8 demands “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”
 9 *Probitry Ins. Servs., Inc. v. United Agric. Benefit Trust*, No. 10-CV-3500-PSG, 2011
 10 WL 1936581, at *2 (N.D. Cal. May 20, 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S.
 11 662, 678 (2009)). In other words, “a plaintiff’s obligation to provide ‘grounds’ of his
 12 ‘entitle(ment) to relief’ requires more than labels and conclusions.” *Das v. WMC*
 13 *Mortg. Corp.*, No. C10-0650-PSG, 2011 WL 2847412, at *1 (N.D. Cal. June 8, 2011)
 14 (quoting *Twombly*, 550 U.S. at 555).

15 A complaint is subject to dismissal if it fails “to state a claim upon which relief
 16 can be granted.” Fed. R. Civ. P. 12(b)(6). “[L]abels and conclusions” or “formulaic
 17 recitation[s] of the elements of a cause of action” are insufficient to state a cognizable
 18 claim and the plaintiff must articulate “enough facts to state a claim to relief that is
 19 plausible on its face.” *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 678. In
 20 order to survive a motion to dismiss, “the non-conclusory factual content, and
 21 reasonable inferences from that content, must be plausibly suggestive of a claim
 22 entitling the plaintiff to relief.” *Wright v. Gen. Mills*, No. 08cv1532, 2009 WL
 23 3247148, at *5 (S.D. Cal. Sept. 30, 2009); *Moss v. U.S. Secret Serv.*, 572 F.3d 962,
 24 969 (9th Cir. 2009). While allegations are generally accepted as true on a motion to
 25 dismiss, conclusory allegations are not. *Papasan v. Attain*, 478 U.S. 265, 286 (1986);
 26 *see also Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (“Nor
 27 is the court required to accept as true allegations that are merely conclusory.”). The
 28 Supreme Court has made it clear that “a complaint attacked by a Rule 12(b)(6) motion

1 to dismiss does not need detailed factual allegations,” but it still ***must plead facts***, and
 2 must do so sufficiently “to raise a right to relief above the speculative level.”
 3 *Twombly*, 550 U.S. at 555 (emphasis added). If the facts alleged cannot form the basis
 4 for relief under a legal theory, dismissal is proper. *Balistreri v. Pacifica Police Dept.*,
 5 901 F.2d 696, 699 (9th Cir. 1990). Further, a court need not assume that a plaintiff
 6 can prove facts different from those he or she has already alleged and, where
 7 appropriate, need not grant leave to amend. *Associated Gen. Contractors v. Calif.*
 8 *State Council of Carpenters*, 459 U.S. 519, 526 (1983). Here, Plaintiffs’ First
 9 Amended Complaint does not meet the standards articulated above.

10 **2. Copyright Infringement**

11 To state a claim for copyright infringement, a plaintiff must show: “(1)
 12 ownership of a valid copyright, and (2) copying of constituent elements of the work
 13 that are original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361
 14 (1991); *Funky Films, Inc. v. Time Warner Entm’t Co.*, 462 F. 3d 1072, 1076 (9th Cir.
 15 2006). To establish the copying prong, a plaintiff must allege that the protected
 16 elements of the works are substantially similar. *Wild v. NBC Universal, Inc.*, 788
 17 F.Supp. 2d 1083, 1098 (C.D. Cal. 2011), *affirmed by*, No. 11-56065, 2013 WL
 18 750655 (9th Cir. Feb. 28, 2013). In assessing substantial similarity, courts employ a
 19 two-part analysis—an “intrinsic” and “extrinsic” test. *Cavalier v. Random House,*
 20 *Inc.*, 297 F. 3d 815, 822 (9th Cir. 2002). The “extrinsic test” is an “objective
 21 comparison of specific expressive elements.” *Id.* at 822-23. Courts only consider the
 22 extrinsic test when determining substantial similarity as a matter of law. *See Funky*
 23 *Films*, 462 F.3d at 1077.

24 Numerous courts in this Circuit have analyzed substantial similarity at the
 25 motion to dismiss stage. *See, e.g., Wild*, 788 F.Supp. 2d at 1098, 1110 (granting
 26 defendant’s motion to dismiss because the works were not substantially similar under
 27 Ninth Circuit copyright jurisprudence); *Mercado Latino, Inc. v. Indio Prods., Inc.*, No.
 28 CV 12-01027 DDP, 2013 WL 2898224, at *2 (C.D. Cal. June 12, 2013) (granting

1 defendant's motion to dismiss for lack of substantial similarity between protected
 2 elements); *Kennedy v. Paramount Pictures*, No. 12cv372-WQH, 2013 WL 1285109,
 3 at *1, 3-4 (S.D. Cal. Mar. 29, 2013) (granting defendant's motion to dismiss due to
 4 lack of substantial similarity between protectable elements); *see also Mandeville-*
5 Anthony v. The Walt Disney Co., No. CV 11-2137-VBF, 2012 WL 4017785, at *1-2
 6 (C.D. Cal. July 28, 2012); *Erickson v. Blake*, 839 F. Supp. 2d 1132, 1138-40 (D. Or.
 7 2012).

8 **B. Plaintiffs' Claim for Direct Copyright Infringement Must Be
 9 Dismissed Because Plaintiffs Fail To State A Claim Upon Which
 Relief May Be Granted**

10 **1. Plaintiffs Continue To Only Allege Defendants Infringed Upon
 11 Non-Protectable Elements of Their Artwork**

12 Plaintiffs, after being generously granted another chance to articulate a viable
 13 claim against Defendants, continue to fail to state a claim. Despite being provided
 14 clear direction by the Court as to what constitutes a sufficiently pled claim of
 15 copyright infringement, Plaintiffs have not identified any protected elements of their
 16 Artwork upon which Defendants' advertisements allegedly infringe in their Amended
 17 Complaint.

18 “Copyright law only protects expressions of ideas, not the ideas themselves.”
 19 *Cavalier*, 297 F. 3d at 823 (citing 17 U.S.C. § 102(b)). Indeed, “[t]he most
 20 fundamental axiom of copyright law is that ‘[n]o author may copyright his ideas.’”
 21 *Feist Publ’ns*, 499 at 344-45 (quoting *Harper & Row, Publishers, Inc. v. Nation
 Enter.*, 471 U.S. 539, 556 (1985)); *see also Mattel, Inc. v. MGA Entm’t, Inc.*, 616 F.3d
 23 904, 913 (9th Cir. 2010) (“[O]thers may freely copy a work’s ideas.”). Furthermore,
 24 “elements of expression that necessarily follow from an idea, or expressions that are
 25 as a practical matter, indispensable or at least standard in the treatment of an idea are
 26 [also] not protected.” *Games of Ariz., Inc. v. PV Onsite*, 561 F.3d 983, 988 (9th
 27 Cir.2009) (internal quotation and alteration omitted).

1 In *Satava v. Lowry*, the Ninth Circuit held that “no copyright protection may be
2 afforded the idea of producing a glass-in-glass jellyfish sculpture or to the elements of
3 expression that naturally follow from the idea of such a sculpture.” 323 F. 3d 805, 810
4 (9th Cir. 2003). The court explained that the plaintiff could not prevent others from
5 copying his depictions of jellyfish because one cannot “prevent others from copying
6 elements of expression that nature displays for all observers.” *Id.* at 812. While noting
7 that the plaintiff’s glass-in-glass jellyfish sculptures were “beautiful,” the court found
8 they merely “combine[d] several unprotectable ideas and standard elements” that are
9 “the common property of all, and [the plaintiff could] not use copyright law to seize
10 them for his exclusive use.” *Id.* at 811.

11 Similarly, in *Erickson v. Blake*, the court dismissed the plaintiff’s copyright
12 infringement claim because the only common element between the plaintiff’s and
13 defendant’s works was a shared concept or idea. 839 F. Supp. 2d 1139-41 (D. Or.
14 2012). The plaintiff in *Erickson* claimed the defendant infringed upon his musical
15 work, which included the plaintiff playing musical notes based on the order of the
16 digits of the number *pi*, because defendant published a YouTube video in which he
17 also constructed a melody by playing musical notes based on the order of the digits of
18 *pi*. *Id.* at 1134. The court noted that copyright law only protected the plaintiff’s
19 expression of his musical composition, such as “the cadence, flourishes, harmonies,
20 structure, and so on,” but it did not protect the plaintiff’s idea of using *pi* to compose a
21 musical work because “[*p*]i is a non-copyrightable fact, and the transcription of *pi* to
22 music is a non-copyrightable idea.” *Id.* at 1139-40. As such, the plaintiff “[could] not
23 use his copyright to stop others from employing this particular pattern of musical
24 notes.” *Id.* at 1139.

25 Here, Plaintiffs’ Amended Complaint fails to state a claim because Plaintiffs’
26 have only identified unprotected elements as the parts of their Artwork upon which
27 Defendants’ have allegedly infringed. A review of the Amended Complaint shows that
28 the purportedly copied elements are dictated by the natural properties of ferrofluid—

1 namely, ferrofluid creating a “pattern of spikes” in response to magnetic fields, (FAC
 2 ¶¶ 30-37, 58-60), the “reflective property of ferrofluid,” (FAC ¶¶ 37, 41, 47),
 3 ferrofluid rising into a column in response to an overhead magnet, (FAC ¶ 42, 58-60),
 4 and a “pool of ferrofluid” when a magnet is not present. (FAC ¶¶ 37-38, 43, 45, 58-
 5 59.) Quite simply, these elements of Plaintiffs’ work cannot form the basis of a
 6 copyright claim because they are not original to the Plaintiffs.²

7 Plaintiffs purport that they specifically “chose” these elements because they are
 8 “aesthetically pleasing.” (See FAC ¶¶ 35-43.) However, as Plaintiffs’ own exhibits
 9 show, it is evident that these “choices” are the result of the natural properties of
 10 ferrofluid—a magnetic liquid—responding to magnetic force. (See, e.g., Ex. 29 to the
 11 FAC³ (showing both similar “patterns of spikes” and the “reflective property of
 12 ferrofluid” in another artist’s work); Ex. 23 (showing ferrofluid forming a column in
 13 response to a magnet in another artist’s work).⁴) As the court in *Satava* highlighted,
 14 elements may be both aesthetically pleasing and naturally occurring. Indeed, artists
 15 may choose to utilize the naturally occurring properties of a medium or capture the
 16 naturally occurring elements of a subject because it is those naturally occurring
 17 elements that create the most appeal. However, that such elements are appealing does
 18 not mean that such elements are subject to copyright protection. As mentioned above,
 19 the court in *Satava* explained:

20 [The plaintiff] may not prevent others from depicting jellyfish with
 21 tendril-like tentacles or rounded bells, because many jellyfish possess

22 ² Plaintiffs own Complaint clearly demonstrates that what they seek is protection for
 23 the idea of using ferrofluid. Indeed, Plaintiffs on one hand allege that Defendants’
 24 copied Plaintiffs’ work and in the same breath admit that “[t]he ferrofluid here flows
 25 very rapidly – too quickly for the camera to catch all of the movement (and
 26 consequently, too quickly to be accurately copied, reverse engineered and modeled by
 27 defendants.” (FAC ¶38.) If the flow of ferrofluid from the pool to the magnet was not
 capable of being copied, the only thing Plaintiffs could be claiming is that Defendants
 copied the idea of ferrofluid flowing from a pool to a magnet, which is a natural
 response of ferrofluid to magnetic forces and not appropriate subject matter for
 copyright protection.

28 ³ All references to exhibits are those Plaintiffs submitted in connection with the FAC.
⁴ The elements upon which Plaintiffs claim Defendants’ infringed are merely natural
 properties of ferrofluid. See, e.g., <http://www.youtube.com/watch?v=4qV-0LMBPnk>.

1 those body parts. He may not prevent others from depicting jellyfish in
 2 bright colors, because many jelly fish are brightly colored. He may not
 3 prevent others from depicting jellyfish swimming vertically, because
 4 jellyfish swim vertically in nature and are often depicted swimming
 5 vertically....[He] may not prevent others from depicting jellyfish within a
 clear outer layer of glass, because clear glass is the most appropriate
 setting for an aquatic animal.

6 323 F. 3d at 811. Similar to the lack of protection available for plaintiff's glass-in-
 7 glass jellyfish sculptures in *Satava*, Plaintiffs' cannot claim copyright protection over
 8 otherwise unprotectable elements of ferrofluid merely because such elements may be
 9 aesthetically pleasing.

10 Indeed, if Plaintiffs were granted protection over these elements, it would be
 11 impossible for any artist to create a work that shows the mechanical and functional
 12 reaction of spikes of ferrofluid emerging from a pool in response to magnetic fields.
 13 Plaintiffs cannot be allowed to so simply achieve copyright for an otherwise
 14 unprotectable process by embodying the process in a video or photo.⁵ Copyright law
 15 cannot be extended to afford such protection. *See, e.g., Dave Grossman Designs, Inc.*
 16 v. *Bortin*, 347 F. Supp. 1150, 1156-57 (N.D. Ill. 1972) ("Picasso may be entitled to a
 17 copyright on his portrait of three women painted in his Cubist motif. Any artist,
 18 however, may paint a picture of any subject in the Cubist motif, including a portrait of
 19 three women, and not violate Picasso's copyright so long as the second artist does not
 20 **substantially copy** Picasso's specific expression of his idea."). Therefore, because the
 21 allegedly infringed elements identified by Plaintiffs in their Artwork and in
 22 Defendants' advertising are not original, expressive elements, and thus Plaintiffs seek
 23 protection over the natural properties of ferrofluid, Plaintiffs claim for copyright
 24 infringement must be denied.

25
 26
 27 ⁵ 17 U.S.C.A. § 102(b) ("In no case does copyright protection ... extend to any idea,
 28 **procedure, process**, system, method of operation, **concept**, principle, or discovery,
 regardless of the form in which it is described, explained, illustrated, or embodied in
 such work.") (emphasis added).

1 **2. The Identified Elements of Plaintiffs' Artwork Are Not**
 2 **Virtually Identical Or Substantially Similar To Defendants'**
 2 **Advertisements**

3 Even if the Court finds that Plaintiffs have identified protectable elements in
 4 their Artwork, the elements of Defendants' advertisements identified by Plaintiffs are
 5 neither virtually identical nor substantially similar to any allegedly protectable
 6 element of the Artwork. Accordingly, the Court should dismiss Plaintiffs' Amended
 7 Complaint as a matter of law. *Wild*, 788 F. Supp. 2d at 1090.

8 When employing the extrinsic test, "it is essential to distinguish between the
 9 protected and unprotected material in a plaintiff's work." *Aurora World, Inc. v. Ty*
 10 *Inc.*, 719 F. Supp. 2d 1115, 1134-35 (C.D. Cal. 2009) (citation omitted). "A court
 11 must take care to inquire only whether the ***protectable elements, standing alone***, are
 12 substantially similar." *Cavalier*, 297 F. 3d at 822 (citation omitted). "Therefore,
 13 when applying the extrinsic test, the court must filter out and disregard the non-
 14 protectable elements in making its substantial similarity determination." *Id.*

15 The degree of copyright protection provided to an element depends on the range
 16 of expression of that element. *Mattel*, 616 F. 3d at 913-14. Where there is only a
 17 narrow range of expression, copyright protection is "thin" and a work must be
 18 "virtually identical" to infringe. *Id.* Conversely, where the range of expression is
 19 broad, a work will infringe if it is substantially similar. *Id.* For example, in *Satava*,
 20 the court noted the limited range of expression available when creating a work based
 21 on nature, such as depictions of jellyfish. 323 F. 3d at 812. Because there is no
 22 protection for the "expression that nature displays," the plaintiff was only entitled
 23 "narrow" copyright protection for variations in his works, such as the background,
 24 lighting, and perspective. *Id.* at 812-13. In such situations, the creator is entitled "thin
 25 copyright" that protects against "virtually identical copying," which the court in
 26 *Satava* found was not present in that case. *Id.* at 812.

27 Once the unprotected elements of a work are filtered out, the Court must
 28 compare the works ***as a whole*** to determine whether there is substantial similarity

1 between the protected elements of Plaintiffs' Artwork and Defendants'
 2 advertisements. *See, e.g., Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435,
 3 1443 (9th Cir. 1994) ("Because only those elements of a work that are protectable . . .
 4 can be compared when it comes to the ultimate question of illicit copying, we use
 5 analytic dissection to determine the scope of copyright protection before works are
 6 considered '***as a whole.***'") (emphasis added); *Idema v. Dreamworks, Inc.*, 162 F.
 7 Supp. 2d 1129, 1176 (C.D. Cal. 2001) ("The unprotectable elements have to be
 8 identified, before the works can be considered ***as a whole.***") (emphasis added).

9 Despite Plaintiffs' assertion that there is a "wide range of expression" available
 10 with respect to the use of ferrofluid, (FAC ¶ 64), the medium is necessarily limited by
 11 the natural properties of ferrofluid, *i.e.*, how the liquid responds to magnetic fields.
 12 Accordingly, Plaintiffs' Artwork is only entitled thin copyright protection and
 13 Defendants' advertisements must be virtually identical for Plaintiffs to state a claim of
 14 copyright infringement. *Satava*, 323 F. 3d at 312.

15 After the unprotected elements of Plaintiffs' Artwork are filtered out, it is
 16 apparent that the Artwork is not substantially similar to—let alone virtually identical
 17 to—Defendants' advertisements. Indeed, there are significant differences in the
 18 arrangement and selection of the allegedly expressive elements identified by Plaintiffs
 19 themselves, including the pace of the videos and the movement of ferrofluid as well as
 20 the background, lighting, and perspective in the two videos. To the extent there is any
 21 similarity between the works otherwise, it is between unprotected elements when
 22 viewed in isolation—not when the works are considered as a whole.

23 To begin, Defendants' choices regarding the background, lighting and
 24 perspective in its Acura Oil Commercial are quite dissimilar to Plaintiffs' Artwork. In
 25 the Amended Complaint, Plaintiffs claim Defendants' commercial are "virtually
 26 identical, or in the alternative, at least substantially similar to the expression" of
 27 Plaintiffs' Artwork because they both begin by "having a set of substantially vertical
 28 spikes appear in [a] hexagonal pattern." (FAC ¶¶ 32, 33, 55.) However, once the

1 unprotected elements—spikes forming in a pool of ferrofluid in reaction to a magnetic
2 field—are filtered out, it is evident that the expressive elements of Plaintiffs' and
3 Defendants' respective works are neither identical nor substantially similar. For
4 example, in Defendants' commercial, the viewer sees spikes emerge from a pool of
5 ferrofluid at an overhead angle and then the commercial alternates between overhead
6 and side views of the spike formation. (Folder C at 0:01-0:23.) Conversely, the
7 viewer of Plaintiffs' Artwork sees spikes initially emerge from a horizontal angle.
8 (Folder A at 2:27-2:30.) Additionally, the spikes in Defendants' advertisement form a
9 perfectly circular pattern surrounded by ripples in ferrofluid while the spikes in
10 Plaintiffs' Artwork form a “hexagonal pattern” with a rippling effect at the corners of
11 the pool of ferrofluid. (*Compare* Folder C at 0:01-23 with Folder A at 2:27-257.)
12 Finally, Defendants' commercial shows a magnet suspended from the ceiling and the
13 pool of ferrofluid appears black in color. (Folder C at 0:01-0:23.) In Plaintiffs'
14 Artwork, however, only the bottom edge of the magnet is visible and the pool of
15 ferrofluid is bluish in color. (Folder A at 2:27-2:57.)

16 Moreover, a comparison of Plaintiffs' Artwork and Defendants' Acura Oil
17 Commercial demonstrates that the pace of the two works and the movement of
18 ferrofluid within them are quite different. The pace of Plaintiffs' video is fast. Spikes
19 emerge from a pool of ferrofluid, rapidly rise and form a wide column with a spiked
20 dome of ferrofluid at the top of the column. (*See* Folder A at 2:27-2:57.) There is no
21 magnetic column visible in Plaintiffs' Artwork. (*Id.*) Additionally, shorter spikes of
22 ferrofluid frantically rise and fall all around the column. (*Id.* at 2:35-2:45.) The
23 column is stationary and lasts for almost twenty seconds before it slowly shrinks and
24 lowers into the pool of ferrofluid. (*Id.* at 2:31-2:51.) There are also other patterns of
25 spiked ferrofluid that form along the edges of the pool. (*Id.* at 2:27-2:57.)

26 The pace of Defendants' commercial, in contrast, is much slower and calmer.
27 Spikes slowly rise out of a pool of ferrofluid and form a thin column in which the top
28 spike stays at a certain distance from the magnet suspended from the ceiling as the

1 spike formation is moved around the room until the top spike finally connects with the
2 magnet and the fluid flows up towards the magnet. (*See* Folder C at 0:02-0:09.)
3 Plaintiffs even acknowledge the lack of similarity between their Artwork and
4 Defendants' commercial by noting "the artist may have changed magnet shapes for
5 this video." (FAC ¶ 59.) The column of ferrofluid moves slowly around the pool,
6 (Folder C at 0:08-0:16), which Plaintiffs admit "is something [that] does not happen in
7 [their Artwork]." (FAC ¶ 61.) The column flows up to the magnet for no more than a
8 few seconds before abruptly dropping and splashing into the pool. (*See* Folder C at
9 0:17-0:23.) The rest of the pool is flat during the video; there are no other patterns of
10 spiked ferrofluid anywhere in the pool. (*Id.* at 0:01-0:23.) Whereas, in Plaintiffs
11 Artwork, ferrofluid does not fall from the magnet in a splashing manner, and there are
12 other patterns of ferrofluid in the pool visible at the same time as the spike formation.
13 (Folder A at 2:27-2:57.)

14 These differences in the pace and movement of ferrofluid show that the
15 allegedly expressive elements of Plaintiffs' and Defendants' works are neither
16 identical nor substantially similar. Additional differences between the Artwork and
17 Defendants' advertising include the background, use of sound, and setting. For
18 example, in Plaintiffs' Artwork is pool of ferrofluid in a container against a white
19 background, Defendants depict ferrofluid filling what could be a room in a large
20 home, with a skylight, archways, artistic moldings, and beige walls. (*Compare* Folder
21 C at 0:02-0:24 *with* Folder A at 2:27-2:57.) Further, the manner of sound and the
22 manner in which sound is used is distinctly different between Plaintiffs' Artwork and
23 Defendants' commercial. Indeed, almost every expressive element of Plaintiffs'
24 Artwork and Defendants' advertising is distinctly different.

25 Other similarities alleged by Plaintiffs (*see, e.g.*, FAC ¶¶ 30, 43, 47-48, 51-52),
26 are inappropriate and irrelevant because they are based on still images taken from
27 Plaintiffs' and Defendants' videographic work, some of which have been zoomed in
28 on. For Plaintiffs' to attempt to compare elements of the still images only in isolation

1 as opposed to the elements within the works as a whole is not in accordance with the
2 type of protection that is afforded by copyright law. It is clear that the standard in the
3 Ninth Circuit is that the works must be compared “as a whole.” *Apple Computer*, 35
4 F.3d at 1443. When viewed as a whole, it is clear that even when comparing the
5 allegedly protected elements of Plaintiffs’ Artwork to Defendants’ advertising, no
6 substantially similarity exists.

7 Because Plaintiffs’ Artwork is only afforded narrow copyright protection, these
8 differences show that Defendants’ advertisements do not infringe the original
9 expression of the protected elements of Plaintiffs’ work.

10 **C. Because Plaintiffs’ Direct Copyright Infringement Claim Must Be
11 Dismissed, the Remainder of the Complaint Should Be Dismissed**

12 The sole jurisdictional basis alleged for Plaintiffs’ Complaint is the allegation of
13 a fatally defective claim of direct copyright infringement. If the direct copyright
14 infringement claim is dismissed, the remaining claims for inducement of copyright
15 infringement, contributory copyright infringement, and vicarious copyright
16 infringement also must be dismissed as direct copyright infringement is an essential
17 element of each such cause of action. *See UMG Recordings, Inc. v. Shelter Capital
18 Partners LLC*, 718 F.3d 1006, 1031 (9th Cir. 2013) (“It is well-established that
19 “[s]econdary liability for copyright infringement does not exist in the absence of direct
20 infringement.””) (quoting *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 101 n.
21 2 (9th Cir. 2001)).

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1 **IV. CONCLUSION**

2 For the foregoing reasons, Plaintiffs' First Amended Complaint against
3 Defendants should be dismissed with prejudice for failure to state a claim pursuant to
4 Rule 12(b)(6).

5
6 Dated: August 9, 2013

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